SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 1, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Moskowitz, Richter, Kapnick, JJ.

12605 The People of the State of New York, Ind. 5216/09
Respondent,

-against-

Lawrence Watson,
Defendant-Appellant.

_____

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Olshan Frome Wolosky, LLP, New York (Renee M. Zaytsev of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole of counsel), for respondent.

_____

Upon remittitur from the Court of Appeals for further consideration (26 NY3d 620 [2016]), judgment, Supreme Court, New York County (Richard D. Carruthers, J. at substitution of counsel ruling; Juan M. Merchan, J. at jury trial and sentencing), rendered October 29, 2010, convicting defendant of criminal possession of a weapon in the second degree (two counts) and resisting arrest, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

Defendant's right of confrontation was not violated when the trial court imposed reasonable limitations upon the scope of defense counsel's cross-examination of one of the People's witnesses. Indeed, defense counsel expressly agreed to the court's limitations regarding certain confidential matters. Thus, defendant's present argument that these limitations violated his right of confrontation is unpreserved, and we decline to review it in the interest of justice.

As an alternative holding, we find that the restriction imposed by the court was a proper exercise of discretion (*see People v Corby*, 6 NY3d 231, 234-235 [2005]) that did not violate defendant's constitutional rights (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). The "trial court has discretion to determine the scope of the cross-examination of a witness" (*People v Corby*, 6 NY3d at 234). Further, the trial court may "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant" (*Delaware v Van Arsdall*, 475 US at 679). The witness' motivation in testifying was readily apparent to the jury from the permitted line of inquiry, and any additional inquiry would have raised concerns

surrounding the witness' safety.

To the extent that defendant is raising an ineffective assistance of counsel claim regarding counsel's acceptance of the court's compromise ruling, that claim is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15758 The People of the State of New York Ind. 525/05
Respondent,

-against-

Geral Jimenez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael Obus, J.), rendered November 2, 2007, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 17 years to life, unanimously affirmed.

On his initial appeal (132 AD3d 410 [1st Dept 2015]), defendant argued that because the trial court did not advise him of the deportation consequences of his guilty plea, he was entitled to a remand of the matter for a hearing on the issue of whether he would have proceeded to trial had he been aware of those consequences (*see People v Peque*, 22 NY3d 168 [2013], *cert denied* 574 US —, 135 S Ct 90 [2014]). Defendant also argued that the trial court erred in failing to order a new psychiatric report before accepting his guilty plea, and that his sentence is

excessive. This Court held the appeal in abeyance and remanded for further proceedings pursuant to *Peque*. We now affirm the conviction.

On remand, the trial court correctly determined that defendant failed to show a reasonable probability that he would not have pleaded guilty had the court advised him of the possibility of deportation. In determining whether a defendant has been prejudiced by a court's failure to warn of the deportation consequences of a guilty plea, factors to consider include "the favorability of the plea, the potential consequences the defendant might face upon a conviction after trial, the strength of the People's case against the defendant, the defendant's ties to the United States and the defendant's receipt of any advice from counsel regarding potential deportation" (*Peque*, 22 NY3d at 198).

Here, the People's evidence against defendant was strong, and the plea deal was favorable under all the circumstances. Defendant's claim of significant family ties to this country is undermined by his own admission that his children and their mother, from whom he had been separated since 2001, had relocated to Texas, as well as statements that he had made during his psychiatric evaluations that he lived alone and had no family in

the country. While defendant claims that he remains legally married to another woman, he has admitted that the two had separated around 2003 and the they have not had contact for years. Thus, his contention that the guilty plea prevented him from obtaining legal status through his marriage is unavailing. Furthermore, a removal proceeding was commenced because of defendant's undocumented status, independent of any conviction. Moereover, evidence that he had abandoned all efforts to complete his application for legal status demonstrates a lack of interest in staying in the United States. We have considered and rejected defendant's remaining arguments on this issue.

The record does not cast doubt on defendant's mental competency, and the court was not obligated, sua sponte, to order a new psychiatric examination before accepting the guilty plea (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]; *People v Gensler*, 72 NY2d 239, 244-245 [1988]). Although defendant had been found incompetent earlier in the proceedings, more recent psychiatric reports found him competent, concluding that he

tended to feign mental illness. In addition, the court properly relied on its own observations of defendant in determining that he was fit to proceed with the plea.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16309-
16310 Index 114045/10

Robert N. Wyble, et al.,
Plaintiffs-Respondents,

-against-

Dale J. Lange,
Defendant-Appellant.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Steven J. Ahmuty, Jr. of counsel), for appellant.

Alexander J. Wulwick, New York, for respondents.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 15, 2014, after a jury verdict in plaintiffs' favor, awarding plaintiff Robert N. Wyble, inter alia, $2,000,000 for past pain and suffering, and $1,500,000 for future pain and suffering (28 years), and awarding plaintiff Zaida Wyble $100,000 for loss of services, as reduced by the court, unanimously modified, on the facts, to direct a new trial on the issue of damages for past and future pain and suffering, unless plaintiffs stipulate, within 30 days of service of a copy of this order with notice of entry, to an award of $900,000 for past pain and suffering and $200,000 for future pain and suffering, and to entry of a judgment in accordance therewith, and otherwise affirmed, without costs. Appeal from order, same

court (Geoffrey D. Wright, J.), entered July 15, 2014, which, inter alia, denied defendant's posttrial motion for judgment as a matter of law, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

We reject defendant's contention that the jury verdict as to liability either was unsupported by legally sufficient evidence or was against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). However, we agree that the jury's pain and suffering awards deviate materially from reasonable compensation to the extent indicated (*see Williams v New York City Health & Hosps. Corp.*, 79 AD3d 440 [1st Dept 2010], *appeal withdrawn* 16 NY3d 827 [2011]).

Inasmuch as plaintiffs have not appealed from the judgment and Mrs. Wyble has reportedly accepted the remittur, her request for an additur is unpreserved. In any event, the amount of the reduction was proper (*see Sienicki v 760 W. End Ave. Owners, Inc.*, 23 AD3d 271 [1st Dept 2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2007 Tami Tal Biton, et al., Index 161689/14
Plaintiffs-Respondents,

-against-

Sameh S. Serour, et al.,
Defendants-Appellants.

_____

Gallo Vitucci Klar LLP, New York (Jared Arthur Turco of counsel), for appellants.

Halperin & Halperin, P.C., New York (Jeffrey Weiskopf of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered March 9, 2016, which, to the extent appealed from as limited by the briefs, restricted infant plaintiff's deposition testimony to the issue of damages, unanimously dismissed, without costs.

The compliance order on appeal is not appealable as of right because it did not decide a motion made on notice, nor did

defendants make a motion seeking leave to appeal (*see* CPLR 5701[a][2]; *Diaz v New York Mercantile Exch.*, 1 AD3d 242, 243 [1st Dept 2003]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2077 The People of the State of New York, Ind. 910/12
Respondent,

-against-

Luis A. Suazo,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered April 30, 2013, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him to a term of 12½ years, unanimously affirmed.

Although defendant asserts that the court improperly denied his motion to withdraw his plea, the record demonstrates that defendant never actually made such a motion, and that he abandoned his initial effort to do so. Although defendant indicated after the plea that he wanted a new lawyer, wanted to withdraw his plea and had "papers," his request for new counsel was granted and at the next adjourned date, no mention was made of the motion or of the unfiled papers, notwithstanding that defendant proclaimed his innocence when asked if he had anything

to say before sentence was imposed. In any event, to the extent defendant could be viewed as having made a plea withdrawal motion, his claim of innocence was conclusory and contradicted by his plea allocution (*see People v Moore*, 132 AD3d 496 [1st Dept 2015], *lv denied* 27 NY3d 1003 [2016]).

Defendant's ineffective assistance of counsel claim regarding the new attorney who represented him at sentencing involves matters not reflected in, or fully explained by, the record, which would require a CPL 440.10 motion. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2078 John A. Liburd, Sr., et al., Index 301296/07
Plaintiffs-Appellants,

-against-

St. Joseph's Medical Center, et al.,
Defendants-Respondents.

_____

Bailly and McMillan, LLP, White Plains (John J. Bailly of counsel), for appellants.

Vouté, Lohrfink, Magro & McAndrew, LLP, White Plains (John R. Braunstein of counsel), for St. Joseph's Medical Center, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Patrick J. Lawless of counsel), for Empress Ambulance Services, Inc. and Edward Steinkraus, respondents.

Bartlett, McDonough & Monaghan, LLP, Mineola (Robert G. Vizza of counsel), for Steven F. Degroat and Michael Guttenberg, M.D., respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered April 24, 2013, which, to the extent appealed from, granted the portions of defendants' motions for summary judgment that sought dismissal of all claims against defendant Nardo San Diego, M.D., the claim that defendants Empress Ambulance Service, Inc. and Edward Steinkraus were negligent in transporting decedent to St. Joseph's Medical Center, rather than to Montefiore Medical Center, and the claim that defendants St.

Joseph's and Michael Guttenberg, M.D. were negligent in failing to redirect the ambulance to Montefiore, and denied plaintiffs' cross motion for an order striking the answers of St. Joseph's, San Diego, and Guttenberg, unanimously affirmed, without costs.

Plaintiffs are the parents of a 17-year-old boy who died of heart failure after suffering cardiac arrest while playing basketball in Yonkers, and being transported by an ambulance to St. Joseph's Medical Center, the nearest hospital.

Defendants Empress Ambulance Service, Inc. and Steinkraus demonstrated prima facie that they acted in conformance with applicable Westchester Regional Paramedic Protocols, which require that a patient be transferred to the closest "appropriate" hospital. It is undisputed that St. Joseph's was the closest hospital, and defendants submitted evidence demonstrating that St. Joseph's was also an appropriate hospital for cardiac patients, even if (unlike Montefiore) it was not a tertiary care center. Plaintiffs failed to raise any triable issues of fact in response. Plaintiffs' cardiology expert's opinion was conclusory and failed to address the Westchester Protocols (*see Foster-Sturrup v Long*, 95 AD3d 726, 728 [1st Dept 2012]). Plaintiffs' emergency medicine expert did not opine that St. Joseph's was inappropriate, but only that a tertiary care

center would have been "preferabl[e]."

The motion court likewise properly dismissed the claims against defendants St. Joseph's, San Diego, and Guttenberg that were based on the allegation that they departed from accepted medical practice by failing to redirect the decedent to Montefiore. These defendants met their burden of showing that, even had they received information concerning decedent's condition before he arrived, they were not obligated under the Westchester Protocols to redirect the ambulance. Plaintiffs failed to raise any triable issues of fact in response.

The motion court properly dismissed all claims against defendant San Diego, since the evidence demonstrated that he did not participate in the decedent's treatment, even in a supervisory capacity.

Finally, the motion court properly denied plaintiffs' cross motion to strike the answer. Plaintiffs failed to demonstrate that the allegedly spoliated X ray was ever taken (*see Schiano v Mijul, Inc.*, 131 AD3d 1157, 1157 [2d Dept 2015]; *Griffin v City of New York*, 67 AD3d 550, 551 [1st Dept 2009]). Even if such an X ray did exist, plaintiffs failed to establish that it

represented a "key piece of evidence" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997] [internal quotation marks omitted]), especially in light of defendants' expert's opinion that it would not "have added any useful diagnostic information."

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2079 Jose Castaneda, et al., Index 155172/15
Plaintiffs-Appellants,

-against-

DO&CO New York Catering, Inc., et al.,
Defendants-Respondents.

_____

Ogen & Sedaghati, P.C., New York (Eitan A. Ogen of counsel), for appellants.

Law Offices of Susan B. Owens, White Plains (Susan B. Owens of counsel), for respondents.

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Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered March 24, 2016, which, insofar as appealed from, denied plaintiffs' motion for partial summary judgment on the issue of liability with leave to renew upon completion of all parties' depositions, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiffs established entitlement to judgment as a matter of law by submitting evidence showing that they were injured when defendants' vehicle hit their stopped vehicle from behind as they waited at a red light (*see Rosario v Vasquez*, 93 AD3d 509 [1st Dept 2012]). In opposition, defendants failed to raise a triable issue of fact. Defendants did not provide a nonnegligent

explanation for why their vehicle rear-ended plaintiffs' vehicle, and they did not demonstrate why depositions of plaintiffs are needed, since the information as to why their car rear-ended plaintiffs' vehicle reasonably rests within defendants' own knowledge (*see Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2080 Ryszard Antoniak, Index 101235/11
Plaintiff-Respondent,

-against-

P.S. Marcato Elevator Co., Inc.,
Defendant-Respondent,

371 Seventh Avenue Co., LLC,
Defendant-Appellant.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Bader & Yakaitis, LLP, New York (Darlene Miloski of counsel), for Ryszard Antoniak, respondent.

Gottlieb Siegel & Schwartz, LLP, New York (Laura R. McKenzie of counsel), for P.S. Marcato Elevator Co., Inc., respondent.

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Order, Supreme Court, New York County (Michael L. Katz, J.), entered February 10, 2016, which denied the motion of defendant 371 Seventh Avenue Co., LLC (371) for summary judgment dismissing the complaint and all cross claims as against it, and for summary judgment on its claim for contractual indemnification against defendant P.S. Marcato Elevator Co., Inc. (PS Marcato), unanimously modified, on the law, to the extent of dismissing the complaint and all cross claims as against 371, and granting 371 conditional contractual indemnification against PS Marcato, and otherwise affirmed, without costs. The Clerk is directed to

enter judgment accordingly.

In support of its motion, 371 made a prima facie showing that it was plaintiff's employer, by submitting plaintiff's W-2 forms, plaintiff's testimony that 371 appeared on his checks, and the affidavit of a 371 executive explaining the corporate structure of the organization. In opposition, plaintiff and PS Marcato offered only speculation that 371 was not plaintiff's employer. The entity plaintiff named as his employer at his deposition and listed by plaintiff in paperwork to his pension fund was a trade name (*see Gherghinoiu v ATCO Props. & Mgt., Inc.*, 32 AD3d 314, 315 [1st Dept 2006], *lv denied* 7 NY3d 716 [2006]). That the trade name, as well as the name of the entity that purchased the master workers' compensation insurance policy for 371, was listed in workers' compensation paperwork is of no evidentiary value, since the issue of the identity of plaintiff's employer was not in dispute before the Workers' Compensation Board (*see Sorrentino v Ronbet Co.*, 244 AD2d 262 [1st Dept 1997]).

The motion court also erred in not granting conditional contractual indemnity in favor of 371 on its claim against PS Marcato. The indemnity provision in the full service elevator contract between defendants was triggered by plaintiff's accident

(*see e.g. Ezzard v One E. Riv. Place Realty Co., LLC.*, 137 AD3d 648 [1st Dept 2016]). In light of PS Marcato's contractual duty to ensure proper leveling, and its admitted weekly inspections, the complaints of alleged misleveling from months and years prior are insufficient evidence of negligence on the part of 371. Furthermore, PS Marcato made no connection between plaintiff's claim that the elevator door was "acting strangely" on the day of his accident and the misleveling. Nevertheless, indemnity at this stage is conditional since 371 failed to establish as a matter of law that it was entirely free from negligence (*see Auliano v 145 E. 15th St. Tenants Corp.*, 129 AD3d 469 [1st Dept 2015]; *Johnson v Chelsea Grand E., LLC*, 124 AD3d 542 [1st Dept 2015]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2081 The People of the State of New York, Ind. 2217/13
Respondent,

-against-

Alfredo Gonzalez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Ronald Alfano of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered May 16, 2014,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: NOVEMBER 1, 2016

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2082 GPI Entertainment, LLC, Index 156610/12
Plaintiff-Appellant,

-against-

Aviv Façade Solutions,
Defendant,

West Side Windows,
Defendant-Respondent.

_____

Gallo Vitucci Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for appellant.

Smith, Buss & Jacobs, LLP, Yonkers (Ryan P. Kaupelis of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about June 25, 2015, which denied plaintiff's motion for partial summary judgment dismissing defendant West Side Windows' counterclaims for account stated and quantum meruit, unanimously affirmed, without costs.

Plaintiff failed to make a prima facie showing of its entitlement to summary judgment dismissing defendant's counterclaim for account stated, as it submitted no evidence, testimonial or otherwise, that it did not receive the invoices at issue, and issues of fact exist as to whether plaintiff's protests regarding defendant's work, including the commencement

of this action, related to any such invoice or were made in a reasonable time (*see Bartning v Bartning*, 16 AD3d 249, 250 [1st Dept 2005]; *Fleming v Vassallo*, 43 AD3d 278, 278-279 [1st Dept 2007]). The court also properly denied plaintiff's motion for summary judgment dismissing defendant's quantum meruit claim, as issues of fact exist regarding whether defendant had agreed to adopt the contract of its predecessor and whether defendant performed any services not covered by that contract (*see Parker Realty Group, Inc. v Petigny*, 14 NY3d 864, 865 [2010]; *Geraldi v Melamid*, 212 AD2d 575, 576 [2d Dept 1995]; *Nemeroff v Coby Group*, 54 AD3d 649, 651 [1st Dept 2008]).

As plaintiff has not met its burden, this Court need not address the discovery concerns raised by defendant as a basis for denial of the motion.

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Webber, JJ.

2083- Index 154951/15
2084-
2085-
2086 Tap Tap, LLC,
Plaintiff-Appellant,

-against-

558 Seventh Ave. Corp., et al.,
Defendants-Respondents.

_____

Rosenberg & Estis, P.C., New York (Michael A. Pensabene of counsel), for appellant.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (David B. Rosenbaum of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about June 30, 2015, which, in this action seeking declaratory and *Yellowstone* injunctive relief arising from an alleged breach of a lease for commercial property, denied plaintiff's objections to the validity of the notice to cure and notice of cancellation, unanimously affirmed, without costs. Order, same court and Justice, entered August 13, 2015, which, inter alia, dismissed the action without prejudice to specified further presentation by plaintiff; order, same court and Justice, entered November 20, 2015, which, inter alia, granted defendants' motion to resettle the August 2015 order to the extent of

modifying the previous without-prejudice dismissal order and dismissing the action with prejudice; and order, same court and Justice, entered March 4, 2016, which granted plaintiff's motion to resettle the order dismissing the action with prejudice to the extent of limiting the "with prejudice" aspect to certain notice issues only, and which denied defendants' cross motion to dismiss the action, unanimously modified, on the law, to the extent of reinstating the complaint, and remanding the matter to Supreme Court to consider the timeliness and merits of plaintiff's *Yellowstone* application, and otherwise affirmed, without costs.

On or about April 3, 2015, defendants served a 15-day notice of default on plaintiff tenant, citing five open violations with respect to the commercially leased space. On April 22, 2015, after the cure period expired, defendants served plaintiff a three-day notice of cancellation, advising plaintiff that it continued to violate the lease by failing to remove the conditions that led to the violations being filed against the building, and terminating the lease effective April 25, 2015.

On May 13, 2015, defendants commenced a summary holdover proceeding in Civil Court seeking plaintiff's eviction based upon the lease cancellation, and on May 18, 2015, plaintiff commenced the instant action seeking declarations that the notices were

nullities, that plaintiff is not in default of the lease because the alleged violations do not constitute material breaches, and that the issuance of the notice of cancellation was improper because plaintiff had diligently and in good faith undertook to remove the violations. Plaintiff also sought injunctions prohibiting defendants from recovering the premises so long as plaintiff worked towards removing the violations and requiring defendants to cooperate with those efforts.

On June 2, 2015, plaintiff moved in Supreme Court by order to show cause for a *Yellowstone* injunction to stay and toll the 15-day notice, to stay the termination pursuant to the notice of cancellation, and to stay the holdover proceedings. After initially granting an interim stay, the court vacated it to address the threshold issue regarding the facial validity of the notices, and in the order entered June 30, 2015, the court held that plaintiff's objections to the notices on the ground that they were invalid and fatally defective lack merit; plaintiff's appeal of that ruling is unavailing. The court further set a conference to discuss the issue of "ability to cure," and prior to the conference, defendants cross-moved to dismiss the complaint and opposed plaintiff's application for *Yellowstone* relief. At the August 4, 2015 conference, the court ordered that

plaintiff's "order to show cause is resolved to the extent that the action is dismissed without prejudice." It further held that "dismissal shall be lifted and the case reopened upon presentation by plaintiff of documentary evidence establishing 'cure' of outstanding DOB violations and compliance with lease provisions."

The court's August 2015 order was erroneous. The court improperly resolved plaintiff's order to show cause seeking *Yellowstone* relief without applying the proper standard for such relief, and improperly dismissed the entire action, sua sponte, when there was no basis for the court to do so. The court also improperly conditioned reopening the action based on presentation of evidence establishing that the violations had been cured when plaintiff was not required to make such a showing in order to assert its claims or obtain a *Yellowstone* injunction. The subsequent orders that modified the August 2015 order failed to resolve the errors, and instead compounded them.

Accordingly, the matter is reopened, the complaint reinstated, and the matter remanded to Supreme Court to consider whether, under the circumstances, plaintiff's *Yellowstone*

injunction was timely filed (*see Village Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219 [1st Dept 2012]), and otherwise warranted on the merits (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508 [1999]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2087 The People of the State of New York, Ind. 1399/13
Respondent,

-against-

George Almeida,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered September 3, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2089 In re Staten Island Branch of the National Association for the Advancement of Colored People, Petitioner-Appellant, Index 10913/15

-against-

The State of New York Grievance Committee for the Second, Eleventh & Thirteenth Judicial Districts, Respondent-Respondent.

_____

James I. Meyerson, New York, for appellant.

John W. McConnell, New York (Lee A. Adlerstein of counsel), for respondent.

_____

Judgment (denominated a decision and order), Supreme Court, Kings County (Bernard J. Graham, J.), entered on or about March 22, 2016, denying the petition to annul respondent's determination, dated April 27, 2015, which declined to open an investigation into petitioner's disciplinary complaint, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court's determination that it lacked jurisdiction over this article 78 proceeding to challenge an Attorney Grievance Committee decision declining to investigate the handling of the grand jury proceeding in the Eric Garner case by former Richmond

County District Attorney Daniel Donovan is supported by well-settled authority; the only avenue for review has already been exhausted through the reconsideration process and an application to the Presiding Justice of the Appellate Division, Second Department (*Matter of Taylor v Adler*, 73 AD3d 937 [2d Dept 2010], *lv denied* 15 NY3d 712 [2010]; *Matter of Pettus v Dudis*, 82 AD3d 896 [2d Dept 2011], *lv denied* 6 NY3d 816 [2006]).

Petitioner's attempt to seek court review and a disciplinary remedy against a duly elected prosecutor who acted within the discretion of his office also fails under the doctrine of separation of powers (*Matter of Soares v Carter*, 25 NY3d 1011 [2015]; *Klosterman v Cuomo*, 61 NY2d 525, 535-536 [1984]; *Jones v Beame*, 45 NY2d 402, 408 [1978]). In any event, petitioner's allegation, that a publicly-elected district attorney is possessed of a conflict of interest per se whenever seeking an indictment against a local police officer, was not sufficiently particularized. Moreover, other remedies are available to hold prosecutors accountable for their discretionary conduct, including the electoral process and an executive order of the

Governor transferring prosecutorial authority to the Attorney General, which, in fact, has occurred for future cases involving fatal actions by police officers (Executive Order [Cuomo] No. 147 [9 NYCRR 8.147] [July 8, 2015]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2090 The People of the State of New York, Ind. 2913/11
Respondent,

-against-

Hector Espada,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Eduardo Padro, J.), rendered October 3, 2012,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: NOVEMBER 1, 2016

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2091 The People of the State of New York, Ind. 359/08
Respondent,

-against-

Raheim Bruno,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alejandro B. Fernandez of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered July 2, 2013, convicting defendant, after a jury trial, of attempted murder in the second degree, and sentencing him to a term of 22 years, unanimously reversed, on the law, and the indictment dismissed.

The evidence was legally insufficient to establish beyond a reasonable doubt defendant's accessorial liability for his codefendant's act of shooting the victim. The evidence of what actually transpired at the time of the shooting was very limited. Although the evidence demonstrated that defendant accompanied the codefendant to an apartment where drugs were sold, and fled with him after the codefendant shot the victim in the head, it failed to show, even when viewed in the light most favorable to the

People, that defendant shared the codefendant's intent to cause the victim's death (*see People v Monaco*, 14 NY2d 43 [1964]; *People v McLean*, 107 AD2d 167 [1st Dept 1985], *affd* 65 NY2d 758 [1985]).

The evidence did not support an inference that defendant's presence could only be explained by his participation in a planned murder. Although there was some support for an inference that defendant may have been involved in a plan to rob the occupants of the apartment, defendant was not convicted of a crime where intent to commit an underlying felony would serve as a replacement for an otherwise required mens rea. To convict of attempted murder, the People were required to prove defendant's actual and specific intent to kill the victim, and their theory that defendant and the codefendant planned to eliminate any witnesses to the robbery is speculative.

Defendant's conduct, including his actions and statements after the crime, fails to negate a reasonable possibility that the codefendant acted unilaterally in shooting the victim. We have considered and rejected the People's remaining arguments.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2092-
2093 Index 652191/15

NWM Capital, LLC,
Plaintiff-Appellant-Respondent,

-against-

Mark Scharfman, et al.,
Defendants-Respondents-Appellants,

Denise Rosenberg, etc., et al.,
Defendants.

_____

McLaughlin & Stern LLP, New York (Matthew D. Sobolewski of counsel), for appellant-respondent.

Emery Celli Brinckerhoff & Abady LLP, New York (Daniel J. Kornstein of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about October 6, 2015, which denied defendants-respondents-appellants' (defendants) pre-answer motion to dismiss the complaint, unanimously modified, on the law, to grant the motion to the extent of dismissing plaintiff's accounting claim, and the complaint as against defendants Mark Scharfman, Lou Malone, 20 Magaw Apts, Inc., 255 Tenants Corp., 270 Fort Washington Ave. Corp., 280 Fort Washington Ave. Corp., Beach Lane Management, Inc., BLM, Inc., Eskimo Lending Company, Inc., and the Scharfman Organization (collectively the nonsignatory defendants), and otherwise affirmed, without costs.

Order, same court and Justice, entered January 27, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on its breach of contract claims involving mortgage proceeds, Beach Lane, and fiduciary compensation; denied plaintiff's motion for partial summary judgment removing the general partners of the four limited partnership defendants; granted defendants' cross motion for summary judgment dismissing the breach of contract claims involving fiduciary compensation, mortgage proceeds, and K-1 tax forms; and denied defendants' cross motion to disqualify plaintiff from serving as a derivative plaintiff, unanimously affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against the nonsignatory defendants.

Plaintiff failed to state a cause of action for an accounting, given the lack of any allegations that a demand for an accounting was refused (*see Kaufman v Cohen*, 307 AD2d 113, 124 [1st Dept 2003]).

A contract action cannot be maintained against the nonsignatory defendants, since they are not signatories to the partnership agreements at issue (*see Brainstorms Internet Mktg. v USA Networks*, 6 AD3d 318, 318 [1st Dept 2004]). The allegations of disgorgement do not preclude dismissal of the action against

them, since disgorgement in this context is a remedy, not a cause of action (*see Access Point Medical, LLC v Mandell*, 106 AD3d 40, 43-44 [1st Dept 2013]).

The motion court correctly dismissed plaintiff's fiduciary compensation claim, since the plain, unambiguous language of the partnership agreements provide for a 35% interest in the distributions and profits to the general partners. We find no conflict between the provisions granting the general partners a 35% interest in the partnerships and section 6.3 of the agreements, which merely allows the general partners to enter into contracts with related parties under terms that are "reasonable and fair" to the partnerships.

The mortgage proceeds claim is time-barred by the six-year statute of limitations applicable to breach of contract actions (*see* CPLR 213[2]; *Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770 [2012]). The two-year fraud discovery rule (*see* CPLR 213[8]; *Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]), is inapplicable since the claim is one for breach of contract, not fraud (*see ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 594 [2015]).

The motion court correctly dismissed the claim regarding

defendants' alleged failure to deliver K-1 tax forms to the limited partners before April 15, since there is no law, rule, or provision in the partnership agreements requiring delivery of the K-1 tax forms before that date (*see* 26 CFR 1.6031[b]-1T[b]).

Plaintiff is not entitled to summary judgment on its Beach Lane claim, since it failed to make a prima facie showing that the management fees of over $300,000 paid to Beach Lane in 2014 were excessive, unfair, or unreasonable. As noted, section 6.3 of the partnership agreements authorize general partners to enter into contracts with related parties under terms that are "reasonable and fair" to the partnerships. They further provide that the fees charged under those contracts cannot be "in excess of those customarily charged for similar services . . . in the same locale." In support of its argument that the management fees were excessive, plaintiff relies on the affidavit of its attorney and manager, who states that plaintiff would be willing to serve as the managing agent for a fee of $100,000. However, counsel's assertion falls far short of evidence of the fees "customarily charged" by managing agents in New York City. Even if plaintiff had met its prima facie burden, defendants raised an issue of fact by submitting the affidavit of Scharfman, who states that the fees paid to Beach Lane are on the low end of

what is customarily charged in New York City.

The motion court properly denied plaintiff's request to remove the general partners and replace plaintiff, a limited partner, as general partner. Removal of a partner is a "rarely invoked" remedy (*Drucker v Mige Assoc. II*, 225 AD2d 427, 429 [1st Dept 1996], *lv denied* 88 NY2d 807 [1996]), and plaintiff failed to demonstrate that "removal is necessary to preserve the partnership" (*Garber v Stevens*, 2012 WL 2091186 [Sup Ct, NY County, June 6, 2012, No. 601917/05]). Eight of the limited partners submitted affidavits stating, among other things, that they do not support plaintiff's request, and that they have always been, and continue to be, completely satisfied with the management of the partnerships and the profits that have been generated.

Defendants' cross motion to disqualify plaintiff as a derivative plaintiff was properly denied, since they failed to show "a substantial likelihood that the derivative action is not being maintained for the benefit of the [limited partners]" (*Barmash v Perlman*, 40 Misc 3d 1231[A], 2013 NY Slip Op 51359[U],

*5 [Sup Ct, NY County 2013] [internal quotation marks omitted]).

We have considered the appealing parties' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2094 In re Carolyn Hairston, Index 100895/15
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Carolyn Hairston, appellant pro se.

David I. Farber, New York (Laura R. Bellrose of counsel), for respondent.

_____

Determination of respondent, dated March 2, 2015, which terminated petitioner's tenancy upon a finding that she was chronically delinquent in making rent payments, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Shlomo Hagler, J.], entered December 1, 2015), dismissed, without costs.

Substantial evidence supports the finding of chronic rent delinquency, given the record of petitioner's rent history, and her admission that she failed to pay her rent when due (*see Matter of Rodriguez v New York City Hous. Auth.*, 84 AD3d 630 [1st Dept 2011]). Petitioner's claim that respondent did not properly credit her rent payments, relying on a Pay-O-Matic report that

she submitted with her motion for poor person relief, cannot be considered by this Court, as she failed to submit this document at the administrative proceeding (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). Furthermore, petitioner's claim that she did not need to pay her rent because respondent did not make repairs and failed to provide unspecified services, also was not raised at the administrative hearing and therefore is unpreserved (*see Matter of Moore v Rhea*, 111 AD3d 445 [1st Dept 2013]), and, in any event, is unavailing.

Under the circumstances presented, the penalty of termination of petitioner's tenancy does not shock one's sense of fairness. Petitioner did not show how her medical circumstances and the death of her brother prevented her from timely paying her rent (*see Matter of Zimmerman v New York City Hous. Auth.*, 84 AD3d 526 [1st Dept 2011]).

We have considered petitioner's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Webber, JJ.

2095 A.C., an Infant by Her Mother and Natural Guardian, Johanny C., et al., Plaintiffs-Appellants, Index 800021/12

-against-

Georges Sylvestre, M.D., et al., Defendants-Respondents,

Geeta Sharma, M.D., Defendant.

_____

Pegalis & Erickson, LLC, Great Neck (Steven E. Pegalis of counsel), for appellants.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered January 12, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint as against defendants Georges Sylvestre, M.D. and New York-Presbyterian Hospital-The University Hospital of Columbia and Cornell (NYPH), unanimously affirmed, without costs.

On May 10, 2010, plaintiff mother, who was then about 20 weeks pregnant, underwent an ultrasound at NYPH, and was examined by defendant Georges Sylvestre, M.D. at NYPH. The sonogram revealed, among other things, cervical incompetence -- a cervix

that dilates without uterine contractions, placing one at risk for, inter alia, preterm birth. Dr. Sylvestre assertedly did not offer to perform a cerclage, a surgery involving a stitch to keep the cervix closed, and prescribed her progesterone vaginal suppositories. The mother delivered the infant plaintiff at about 23 weeks and 4 days' gestation, and the infant suffers from severe brain injuries.

Defendants met their burden of showing that Dr. Sylvestre exercised his best judgment in prescribing progesterone, rather than performing the surgical cerclage procedure, through their expert's affirmation demonstrating that the mother was not a candidate for cerclage, and that progesterone had been cited with approval in peer reviewed studies as more effective than cerclage (*see Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]).

In opposition, plaintiffs failed to raise an issue of fact. Plaintiffs' expert opined that, pursuant to good and accepted obstetrical practices, there are two treatment options for cervical incompetency: expectant management with progesterone and serial ultrasounds, or placement of a cervical cerclage. Plaintiffs' expert further opined that cerclage is "preferable," but did not opine that Dr. Sylvestre departed from the standard

of care in prescribing progesterone.

Absent any opinion by plaintiffs' expert that Dr. Sylvestre departed from the standard of care in prescribing progesterone, which the expert acknowledged was a medically acceptable treatment, plaintiffs did not raise an issue of fact as to the doctor's departure from the standard of care (*see Ramos v Weber*, 118 AD3d 408, 408-409 [1st Dept 2014], *lv dismissed* 26 NY3d 1127 [2016]; *see generally Nestorowich*, 97 NY2d at 398).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2096 The People of the State of New York, Ind. 493/12
Respondent,

-against-

Robert Rodriguez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Juan Merchan, J.), rendered November 25, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2097 In re Royce Corley, Index 250636/14
Petitioner-Appellant,

-against-

New York City Department of Corrections, et al.,
Respondents-Respondents.

Royce Corley, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondents.

Judgment (denominated an order), Supreme Court, Bronx County (Wilma Guzman, J.), entered November 18, 2014, denying the petition seeking a writ of mandamus to compel respondents to refund $2,000 in charges for phone calls placed while petitioner was incarcerated at Rikers Island, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Even if petitioner exhausted his administrative remedies, the court properly rejected the petition on the merits, since petitioner failed to support his claim that he was entitled to a partial refund of the charges for phone calls while incarcerated at Rikers Island because the charges in excess of $0.03 per

minute were excessive (*see generally Matter of Walton v New York State Dept. of Correctional Servs.*, 13 NY3d 475 [2009]). Insofar as the petition asserts that respondents' failure to address his grievances at the administrative level deprived him of his right to procedural due process, this claim is unavailing, since he points to no independent law or rule entitling him to make such calls at a rate below what he was charged, which was undisputedly in accordance with the applicable contract (*see Board of Regents of State Colls. v Roth*, 408 US 564, 577 [1972]).

Petitioner was not entitled to a default judgment based on respondents' alleged failure to comply with the court's direction to serve a copy of the order with notice of entry on petitioner within 30 days, in the absence of any showing of prejudice (*see Santoli v 475 Ninth Ave. Assoc., LLC*, 38 AD3d 411, 415 [1st Dept 2007]), willfulness, or bad faith (*see Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010]).

Petitioner failed to preserve his contention that he was deprived of due process when he was prevented from filing a reply below, and we decline to review it in the interest of justice. Were we to review it, we would reject it on the merits.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2098- Index 22428/12E
2099N Myika Darbeau,
Plaintiff-Appellant,

-against-

136 West 3rd Street, LLC, et al.,
Defendants-Respondents.

_____

Law Offices of Alan H. Greenberg, P.C., Melville (Alan H. Greenberg of counsel), for appellant.

Stonberg Moran, LLP, New York (Michael L. Stonberg of counsel), for 136 West 3rd Street, LLC, respondent.

Ahmuty, Demers & McManus, Albertson (Nicholas M. Cardascia of counsel), for Ra Yon McIntosh, respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered September 28, 2015, which, to the extent appealed from as limited by the briefs, granted defendant McIntosh's motion to vacate the default judgment against him to the extent of ordering a hearing on the issue of whether he received actual notice of this action in time to defend, and denied defendants' motions without prejudice to the extent they sought to change venue, unanimously reversed, on the law, the motions to change venue denied with prejudice, and the appeal otherwise dismissed, without costs, as moot. Order, same court and Justice, entered May 11, 2016, which, among other things, granted defendant 136

West 3rd Street, LLC's (the LLC) motion to vacate the default judgment against it, pursuant to CPLR 317, and granted McIntosh's motion to vacate the default judgment against him to the extent of vacating the monetary damages award and directing that a new assessment of damages with respect to McIntosh occur at trial, unanimously affirmed, without costs.

Service upon the LLC was complete upon service to the Secretary of State (*see* Limited Liability Company Law § 303[a]). Moreover, because the LLC's motion papers indicate that it chose to seek vacatur pursuant to CPLR 317 and 5015(a)(1), which presume jurisdiction, and not CPLR 5015(a)(4), it is precluded from arguing that any deficiency in service constituted a lack of jurisdiction (*Caba v Rai*, 63 AD3d 578, 580-581 [1st Dept 2009]; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C317:2 at 94-95).

Nevertheless, Supreme Court properly vacated the default judgment against the LLC pursuant to CPLR 317. The Secretary of State did not mail the summons and complaint to the LLC's address "on file" (Limited Liability Company Law § 303[a]). Further, all notices to the LLC regarding the action were misaddressed in some fashion, and the regular mail carrier for the LLC's office acknowledged that he did not follow certified mail procedures

with regard to delivering the summons and complaint to the LLC (*see id.*). Given the strong public policy of resolving actions on the merits, that the statutorily prescribed methods of delivery to ensure receipt of the summons and complaint did not occur, that all notices to the LLC regarding the action were misaddressed in some fashion, and that the LLC inexplicably failed to respond to the action despite ample insurance coverage, Supreme Court providently exercised its discretion in determining that the LLC did not receive notice of the action in time to defend (*see* CPLR 317). In addition, Supreme Court properly determined that the LLC has a meritorious defense (*id.*; *see Dykes v McRoberts Protective Agency*, 256 AD2d 2, 3 [1st Dept 1998]).

The issue of whether Supreme Court properly ordered an evidentiary hearing to determine whether McIntosh received actual notice of this action in time to defend is moot, since Supreme Court determined that McIntosh was not entitled to vacatur pursuant to CPLR 317 after he failed to appear at the hearing, and McIntosh has not appealed from that ruling.

Supreme Court providently exercised its discretion in vacating the damages award against McIntosh in the interest of justice, given the size of the judgment against him, his showing of a meritorious defense, and the inconsistency and injustice

that will result if, at trial against the LLC, a jury finds that McIntosh's actions were justified (*Neuman v Greenblatt*, 260 AD2d 616, 617 [2d Dept 1999]; *New York Annual Conference of United Methodist Church v Preusch*, 51 AD2d 711 [1st Dept 1976]). Because the complaint did not seek damages for a sum certain or ascertainable by calculation, McIntosh may offer evidence at trial to mitigate damages (*Conteh v Hand*, 234 AD2d 96 [1st Dept 1996]). McIntosh also may offer evidence of comparative negligence insofar as it relates to plaintiff's damages (*see Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730-731 [1984]).

Defendants' motions to change venue from Bronx County to Suffolk County should have been denied with prejudice. As noted, the LLC has waived any jurisdictional argument. Accordingly, we reject its argument that the motions to change venue should not be decided "with prejudice" until jurisdiction over the parties is established. In addition, records from the Department of Motor Vehicles show that McIntosh resided in Bronx County when the action was commenced (*see* CPLR 503[a]), and his affidavit stating that he lived in Queens was insufficient to satisfy his burden of showing that the venue chosen by plaintiff was improper (*Singh v Empire Intl., Ltd.*, 95 AD3d 793 [1st Dept 2012]).

We have considered plaintiff's remaining arguments, including her request for security and costs, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2100N In re DTG Operations, Inc. doing business as Dollar Rent A Car,
Petitioner-Appellant,

-against-

AutoOne Insurance Company as subrogee of Vincent Harris, et al.,
Respondents-Respondents.

Index 156932/13

Rubin, Fiorella & Friedman LLP, New York (Aaron F. Fishbein of counsel), for appellant.

Marschhausen & Fitzpatrick, P.C., Westbury (Kevin P. Fitzpatrick of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered November 16, 2015, in favor of respondent AutoOne Insurance Company (AutoOne), and bringing up for review an order, same court and Justice, entered September 24, 2014, which denied the petition of DTG Operations, Inc. d/b/a Dollar Rent-A-Car (Dollar) to vacate certain arbitration awards and granted judgment confirming those awards, as modified, in favor of AutoOne, unanimously affirmed, without costs.

Here, where the arbitration was compulsory pursuant to Insurance Law § 5105(b), the arbitrator's findings are subject to "closer judicial scrutiny" than a voluntary arbitration, and the award "must have evidentiary support and cannot be arbitrary and

capricious" (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; *Matter of DiNapoli v Peak Automotive, Inc.*, 34 AD3d 674, 675 [2d Dept 2006]). Applying this standard, the arbitrator's decision finding that loss transfer under Insurance Law § 5105(a) was applicable because the vehicle insured by AutoOne was "used principally for the transportation of persons or property for hire," had ample evidentiary support and was not arbitrary and capricious.

The AutoOne vehicle had been registered as a livery vehicle for the five years prior to the accident, and the change of registration – just five days prior to the date of loss – was orchestrated by an insurance agent who was illegally insuring "dollar vans" as personal use vehicles. All four of the injured passengers confirmed that the AutoOne vehicle was being used as a vehicle for hire and for commercial purposes on the accident date, and the registration on the AutoOne vehicle was switched back to a "livery" vehicle shortly following the accident. Thus, there was adequate support for the arbitrator's finding that the AutoOne vehicle was being used, "principally," for the "transportation of persons or property for hire," and loss transfer applied (*Matter of State Farm Mut. Auto. Ins. Co. v Aetna Cas. & Surety Co.*, 132 AD2d 930 [4th Dept 1987], *affd* 71

NY2d 1013 [1988]; *Matter of 20th Century Ins. Co. [Lumberman's Mut. Cas. Co.]*, 80 AD2d 288, 290 [4th Dept 1981]).

We have considered Dollar's remaining contentions, particularly that this Court should turn to various local laws in its interpretation of Insurance Law § 5105(a), and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2101 In re Marcus Rogers, Index 435/16
[M-4393] Petitioner,

-against-

Hon. Margaret L. Clancy,
etc., et al.,
Respondents.

_____

Marcus Rogers, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Margaret L. Clancy, respondent.

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for Hon. Darcel D. Clark, respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2102 The People of the State of New York, SCID 30097/14
Respondent,

-against-

Stewart McLean,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about September 11, 2014, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court's discretionary upward departure was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument (*see e.g. People v Sherard*, 73 AD3d 537 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]). The court properly based its upward departure on factors including the extreme violence and brutality involved in the underlying crime, and the crimes he committed after his release from prison, including his failure to register as a sex

offender. The mitigating factors he raises are outweighed by the aggravating factors noted by the court.

The People failed to satisfy the 10-day notice provision of Correction Law § 168-k(2) of their intention to seek a sexually violent offender designation, which was omitted from the recommendation of the Board of Examiners of Sex Offenders. However, the court provided an appropriate remedy by offering defendant an adjournment for further preparation, and then adjourning the case for one month (*see People v Lucas*, 118 AD3d 415 [1st Dept 2014]). Defendant could not have been prejudiced, because it is undisputed that his out-of-state conviction qualified as an enumerated sexually violent offense, leaving the court no discretion to relieve him of the corresponding designation (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]), so that there was nothing to litigate in this regard. The Board's omission appears to have been an oversight.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2103 In re Nikim M.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy Park of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about April 3, 2015, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placing him with the Office of Children and Family Services for a period of 18 months, unanimously reversed, on the law, without costs, the adjudication vacated and the petition dismissed as an exercise of discretion in the interest of justice.

The record does not establish that a "reasonable and substantial effort was made" to provide notice of the fact-finding hearing, at which appellant's admission was entered, to his mother (Family Ct Act § 341.2[3]), or that she was given a

reasonable opportunity to attend the hearing. At the commencement of the hearing, counsel stated that appellant's mother, although absent, had been informed of the court date. When appellant stated that he wanted his mother to be present at the hearing, the court instructed counsel to telephone her, ascertain whether she would be coming to court, and if not, explain why. Counsel, after speaking with the mother, informed the court that she did not know the time the hearing had been scheduled for, and would not be able to attend. The mother's communication that she was no longer able to come to court on that particular day gave no indication that she chose not to attend at all. In light of counsel's statement that the mother was unaware of the time she needed to come to court, the court should at least have inquired as to "the nature or degree of any effort made to notify [her]" (*Matter of Myacutta A.*, 75 AD2d 774, 774 [1st Dept 1980]), and ascertained whether she had been notified of both the date and time, and hence been given a reasonable opportunity to attend.

Because appellant has already completed his placement, we exercise our discretion to dismiss the petition instead of remanding for a new fact-finding hearing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2105 Matthew Chmielowiec, Index 302267/08
Plaintiff-Respondent,

Damien Blackwood, et al.,
Defendants,

The Noga Company, LLC, et al.,
Defendants-Appellants.

_____

Steven F. Goldstein, LLP, Carle Place (Steven F. Goldstein of counsel), for appellants.

Gallagher, Walker, Bianco & Plastaras, Mineola (Brian R. Kenney of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 9, 2015, which denied defendants-appellants' motion for summary judgment dismissing the complaint as against them on the ground that it was untimely, unanimously affirmed, without costs.

Appellants' assertion that they were unaware that the case had been assigned to Justice Guzman's part before they moved for summary judgment is unsupported by the record and therefore cannot be considered (*see Chimarios v Duhl*, 152 AD2d 508 [1st Dept 1989]). The assertion is also belied by their notice of motion, which is in the record, and which identifies the IAS Part and judge to which the motion should be referred. Since

appellants provided no explanation for filing their motion for summary judgment outside the time period set by the rules of the assigned IAS judge, the motion court did not improvidently exercise its discretion in denying the motion as untimely (*see Fine v One Bryant Park, LLC*, 84 AD3d 436 [1st Dept 2011]; *see also* CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2106 The People of the State of New York, Ind. 3465/13
Respondent,

-against-

Tyler Simmerman,
Defendant-Appellant.

_____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Beth Kublin of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered May 14, 2015, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal (*see People v Powell*, 140 AD3d 401 [1st Dept 2016]), we perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2107 The People of the State of New York, Ind. 812/04
Respondent,

-against-

George Medlin,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Jeffrey Dellheim of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered February 5, 2005, convicting defendant, after a jury trial, of three counts of rape in the first degree and six counts of criminal sexual act in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 25 years, and order, same court and Justice, entered December 12, 2012, which denied defendant's CPL 440.10 motion to vacate the judgment of conviction, unanimously affirmed.

After a thorough hearing, the court properly concluded that defendant received effective assistance of counsel. Defendant asserts that his trial counsel should have called, or at least consulted, two kinds of expert witnesses. However, defendant has not shown that the alleged omissions fell below an objective

standard of reasonableness, or that, viewed individually or collectively, they caused any prejudice under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Initially, we note that although the conviction rested primarily on the testimony of the victim, who was six years old at the time of the crime, her testimony was highly credible. The jury could have reasonably concluded that the victim's detailed description of sexual activity had the ring of truth and could have only been the product of actual experience, and that she had no reason to accuse defendant, her mother's boyfriend, unless he was the perpetrator.

Defendant was not deprived of effective assistance by his attorney's decision not to call a medical expert to testify on alternative causes of the two-millimeter tear in the victim's perihymenal area. At the CPL 440.10 hearing, defendant's medical expert agreed with the People's expert that physical findings do not stand alone in forming a diagnosis of sexual abuse, but must be taken together with medical history, including statements from the child and caretakers. Here, the victim's credible testimony was consistent with the medical history used to formulate the diagnosis of sexual abuse. Under these circumstances, it is

unlikely that the proffered medical expert testimony would have been helpful to the defense. While it might have been reasonable to call a medical expert, the actual strategy adopted by the defense at trial — to appeal to the jury's common sense in arguing that a sexual assault by a grown man on a six-year-old girl would have resulted in significant trauma, and not merely a two-millimeter tear — was also objectively reasonable. Moreover, this was part of a coherent and legitimate overall defense strategy. In any event, defendant has not demonstrated a reasonable probability that calling a medical expert would have affected the outcome.

Defendant was likewise not deprived of effective assistance by his trial counsel's failure to call an expert to attempt to discredit the People's expert psychologist's testimony on child sexual abuse syndrome. The People's expert simply explained that child sex abuse victims frequently delay disclosure of the abuse. Such testimony is generally accepted by New York courts when introduced for that purpose, so long as it is not used to prove that the abuse actually occurred (*see People v Williams*, 20 NY3d 579, 584 [2013]; *People v Spicola*, 16 NY3d 441, 466-467 [2011], *cert denied* 565 US 942 [2011]; *People v Adams*, 135 AD3d 1154, 1157 [3d Dept 2016], *lv denied* 27 NY3d 990 [2016]). Regardless

of whether the particular record in *Gersten v Senkowski* (426 F3d 588, 611 [2d Cir 2005], *cert denied sub nom Artus v Gersten*, 547 US 1191 [2006]) may have indicated that a defense expert could have discredited the People's expert in that case, here defendant made no showing that the psychologist's limited testimony would have been readily rebuttable. In the CPL 440.10 proceeding, defendant did not present an affidavit or testimony from any psychologist. In any event, regardless of whether trial counsel should have called such an expert, defendant has likewise failed to demonstrate a reasonable probability that calling the expert would have affected the outcome.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2108 Lampros Nikolas Antiohos, by Estelle Reynolds, as Guardian of the Person and Property of Lampros Nikolas Antiohos,
Plaintiff-Respondent,

-against-

Arthur Morrison,
Defendant-Appellant,

The Law Firm of Daniel M. O'Hara, PLLC, et al.,
Defendants. Index 25894/14

_____

Morrison Law Offices of Westchester, P.C., Hawthorne (Arthur Morrison of counsel), for appellant.

Law Offices of Ira M. Perlman, P.C., and Robert D. Rosen, P.C., Great Neck (Robert D. Rosen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered October 9, 2015, which denied defendant Arthur Morrison's motion for an order vacating his default in answering, extending his time to answer, compelling plaintiff to accept his answer, and dismissing plaintiff's complaint for failure to state a cause of action, unanimously affirmed, without costs.

A party seeking additional time to appear or plead, or to compel the acceptance of a pleading untimely served, must make "a showing of reasonable excuse for delay or default" (CPLR 3012[d];

2004; *see Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616, 618 [1st Dept 2012]). Defendant Morrison failed to provide a reasonable excuse for his failure to serve a timely answer to the complaint served at his place of business (*see Toure v Harrison*, 6 AD3d 270, 271-272 [1st Dept 2004]). His contention that he was not properly served is belied by the affidavit of service which states that he was served at his law office, the same address appearing on his own motion papers (*see Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). His argument that he did not timely answer because he was in ill health was not asserted below, although he submitted unaffirmed doctor's notes concerning his health at the time the motion was made.

Morrison's argument concerning plaintiff's late filing of the affidavit of service is also raised for the first time on

appeal based on matters dehors the record, and we decline to consider it (*see Matter of Brodsky v New York City Campaign Fin. Bd.*, 107 AD3d 544, 545 [1st Dept 2013]). We have considered and rejected Morrison's remaining contentions.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2109-
2110-
2111-
2112 Index 311825/14

Ronit Mitnik,
Plaintiff-Respondent,

-against-

Oleg Mitnik,
Defendant-Appellant,

Aronson Mayefsky & Sloan, LLP,
Nonparty Respondent.

_____

Stein Riso Mantel McDonough, LLP, New York (Kevin M. McDonough of counsel), for appellant.

The Wallack Firm, P.C., New York (Robert M. Wallack of counsel), for Ronit Mitnik, respondent.

Aronson Mayefsky & Sloan, LLP, New York (Allan E. Mayefsky of counsel), for Aronson Mayefsky & Sloan, LLP, respondent.

_____

Appeal from order, Supreme Court, New York County (Lori S. Sattler, J.), entered August 2, 2016, which, to the extent appealed from, directed the Clerk to enter a judgment in favor of nonparty law firm (firm) and against defendant husband in the amount of $200,000 plus interest, deemed appeal from so much of judgment, same court and Justice, entered August 4, 2016, in the amount of $200,000 plus interest in favor of the firm and against defendant (CPLR 5520[c]), and, so considered, judgment

unanimously affirmed, without costs. Judgment, same court and Justice, entered April 12, 2016, in favor of the firm and against the husband in the total amount of $308,284.93, and in favor of Financial Research Associates (FRA) and against the husband in the total amount of $77,071.23, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 1, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff wife's motion for interim counsel and expert fees to the extent of directing the husband to pay interim counsel fees to the firm in the amount of $300,000 and interim expert fees to FRA in the amount of $75,000, unanimously dismissed, without costs, as subsumed in the appeal from the judgment entered April 12, 2016. Order, same court and Justice, entered April 8, 2016, which, to the extent appealed from as limited by the briefs, denied the husband's motion to renew the wife's motion for interim counsel and expert fees, granted the wife's cross motion for an order directing the Clerk to enter a money judgment against the husband for the interim counsel and expert fees awarded plus interest, and granted the wife's cross motion for additional interim counsel fees to the extent of directing the husband to pay the firm an additional $200,000 in fees, unanimously affirmed as to the denial of the

husband's motion, and the appeal otherwise dismissed, without costs, as subsumed in the appeals from the judgments.

The motion court providently exercised its discretion in awarding interim counsel and expert fees to the extent indicated, considering the circumstances of the case and the respective financial positions of the parties (Domestic Relations Law § 237[a]; *Evgeny F. v Inessa* B., 127 AD3d 617, 617 [1st Dept 2015]). The record demonstrates that the husband is in a superior financial position, has significant hidden assets, and heavily litigated the matter before the motion court (*O'Shea v O'Shea*, 93 NY2d 187, 190 [1999]; *Evgeny*, 127 AD3d at 617). Further, the wife's fee applications were substantiated with detailed invoices listing each service provided by date, and were supported by extensive affirmations outlining the work done, and to be done, at the time of the motions. Under the circumstances, the motion court properly determined that the firm, the wife's then-counsel, should be awarded the bulk of the legal fees requested and that FRA, the wife's financial expert, should be awarded the full amount of its requested fee (*Evgeny*, 127 AD3d at 617; *see Ahern v Ahern*, 94 AD2d 53, 58 [2d Dept 1983]).

The husband was not entitled to a hearing prior to the interim awards (*Meyer v Meyer*, 229 AD2d 354, 355 [1st Dept 1996]).

We have considered the husband's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2113 The People of the State of New York, Ind. 3617/14
Respondent,

-against-

Cornelius Ikpemgbe,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of Counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered March 11, 2015,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: NOVEMBER 1, 2016

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2115 Carlos Paulino, Index 304990/10
Plaintiff-Respondent,

-against-

Bradhurst Associates, LLC, et al.,
Defendants-Respondents-Appellants,

Universal Construction Contractors, Inc.,
Defendant-Appellant-Respondent.

_____

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for appellant-respondent.

Carol R. Finocchio, New York, for respondents-appellants.

Law Office of Richard E. Lerner, P.C., New York (Richard E. Lerner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered September 22, 2015, which, to the extent appealed from as limited by the briefs, granted defendants Bradhurst Associates, LLC and Tryax Realty Management Co.'s motion to the extent they sought summary judgment on their contractual indemnification claim against defendant Universal Construction Contractors, Inc., and denied the motion to the extent they sought to dismiss the Labor Law § 241(6) claim, unanimously affirmed, without costs.

Plaintiff was injured when a screw he was driving into Sheetrock using a power drill sprang back and struck him in the

eye. An issue of fact exists whether plaintiff was "engaged in an[] . . . operation which may endanger the eyes" (Industrial Code [12 NYCRR] § 23-1.8[a]), precluding summary dismissal of his Labor Law § 241(6) claim (*see Buckley v Triborough Bridge & Tunnel Auth.*, 91 AD3d 508 [1st Dept 2012]; *McByrne v Ambassador Constr. Co.*, 290 AD2d 243 [1st Dept 2002]).

The agreement between Universal and Tryax required Universal to indemnify Bradhurst and Tryax "[t]o the fullest extent permitted by law . . . against all liability, claims and demands on account of injury to persons . . . arising out of the performance, or lack or performance, of the Agreement by [Universal]." The language of the agreement as a whole, coupled with the surrounding circumstances, demonstrates that the parties intended to obligate Universal to indemnify Bradhurst and Tryax for any liability stemming from the renovation work; that obligation was triggered by the claim of plaintiff, an employee of Universal, for damages for injuries he sustained while performing Universal's work (*see Shea v Bloomberg, L.P.*, 124 AD3d 621, 623 [2d Dept 2015]; *Fuger v Amsterdam House for Continuing Care Retirement Community, Inc.*, 117 AD3d 649, 650 [1st Dept 2014]).

Moreover, the common-law negligence and Labor Law § 200 causes of action having been dismissed, there is no bar to contractual indemnification for Bradhurst and Tryax, because any liability imposed on them under Labor Law § 241(6) will be purely vicarious (*see Best v Tishman Constr. Corp. of N.Y.*, 120 AD3d 1081, 1082 [1st Dept 2014]; *see Quiroz v Wells Reit-222 E. 41st St., LLC*, 128 AD3d 442, 443 [1st Dept 2015]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2116 Madison Equities, LLC, Index 162041/14
Plaintiff-Appellant,

-against-

Serbian Orthodox Cathedral
of St. Sava,
Defendant-Respondent.

_____

Davidoff Hutcher & Citron LLP, New York (Gary I. Lerner of counsel), for appellant.

Emmet, Marvin & Martin LLP, New York (Paul T. Weinstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about December 17, 2015, which granted defendant's motion to dismiss the amended complaint pursuant to CPLR 3211(a)(1), unanimously affirmed, without costs.

"[W]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1)" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). Here, plaintiff contends that, in paragraph 8 of the parties' letter of intent, defendant

represented and warranted that it had no agreement with Tenantwise, Inc. concerning the calculation of the latter's fees. However, paragraph 8 simply does not say what plaintiff claims it says, and thus, the court properly granted defendant's motion.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2117 The People of the State of New York, Ind. 4591/12
Respondent,

-against-

Janvier Encarnacion, etc.,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 19, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2120 The People of the State of New York, Ind. 3266/13
Respondent,

-against-

Chad Sam,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Richard Carruthers, J.), rendered June 3, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2121 Tampara Jackson, as Administrator of the Estate of Elsie Turner,
Plaintiff-Respondent,

-against-

Happy Care Ambulette, Inc.,
Defendant-Appellant,

Da Vita Inc., et al.,
Defendants.

Index 308824/09

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for appellant.

Giordano Law Offices PLLC, New York (Carmen J. Giordano of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 10, 2015, which denied the motion of defendant Happy Care Ambulette, Inc. (Happy Care) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Plaintiff's decedent fell when, while being assisted to dialysis treatment by Happy Care's ambulette driver, the driver left the decedent unattended so as to open a door. The record shows that Happy Care failed to demonstrate prima facie that its negligence was not a proximate cause of the decedent's fall. The ambulette driver testified that the decedent sometimes used a

wheelchair, and her daughter stated that she had informed the regular driver that the decedent required assistance at all times. Accordingly, triable issues of fact exist as to whether it was foreseeable that if the decedent were left unattended, however briefly, she might fall due to her physical limitations (*see Reavey v State of New York*, 125 AD2d 656 [2d Dept 1986]). Furthermore, Happy Care failed to conclusively show that it was not "more likely" or "more reasonable" that the alleged injuries were caused by its negligence than by some other agency (*Gayle v City of New York*, 92 NY2d 936, 937 [1998] [internal quotation marks omitted]).

We have considered Happy Care's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2123N Rosemarie A. Herman, etc., et al., Index 650205/11
Plaintiffs-Respondents,

Avon Bard LLC, et al.,
Plaintiffs,

-against-

Julian Maurice Herman, et al.,
Defendants-Appellants,

Michael Offit, et al.,
Defendants.

- - - - -

[And A Third-Party Action]

_____

Baker Hostetler LLP, New York (John Siegal and Erica Barrow of counsel), for appellants.

Law Office of Craig Avedisian, P.C., New York (Craig Avedisian of counsel), and Jaspan Schlesinger LLP, Garden City (Natasha Shishov of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 2, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to preclude defendant J. Maurice Herman (Maurice) from participating in the inquest to assess plaintiffs' damages against him, and denied Maurice's cross motion to preclude plaintiffs from offering certain evidence at the inquest, unanimously affirmed, with costs.

The court properly precluded Maurice from participating in the inquest due to his failure to comply with a conditional order that would preclude him if he did not timely produce properly redacted tax returns and certain communications, and due to his failure to establish any reasonable excuse for his noncompliance (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]; *Keller v Merchant Capital Portfolios, LLC*, 103 AD3d 532 [1st Dept 2013] *see Settembrini v Settembrini*, 270 AD2d 408, 409 [2d Dept 2000]).

In addition to that order, the court, in a second conditional order and two more orders after that, gave Maurice additional chances to avoid preclusion by fully complying with the original conditional order, which had itself granted a default judgment against Maurice because of his repeated failures to comply with earlier discovery orders. His failures to comply with each order, particularly regarding information the court had required not be redacted on his tax returns, unnecessarily protracted the discovery litigation.

A lesser sanction would not have deterred the continued violations, as the court in fact gave him a second, third, and fourth chance to comply with its order, by which time he still had not fully complied.

Although no finding of willfulness was required here, where

a conditional order granting a default judgment against Maurice had issued based on his prior failure to comply with the court's discover orders (*see Herman v Herman*, 134 AD3d 442 [1st Dept 2015], *lv dismissed* 27 NY3d 973 [2016]), his failure to fully comply with four court orders directing him to produce certain documents warrants an inference of willful noncompliance (*Keller* at 533).

Finally, the court properly denied that part of Maurice's cross motion seeking to exclude from the inquest any evidence that postdates the 1998 transaction. In light of the default judgment against him, Maurice was liable on numerous claims in the complaint, including unjust enrichment and constructive trust, for which plaintiffs' damages may not be limited to out of pocket losses from the 1998 transaction at issue (*see Schatzki v Weiser Capital Mgt.*, 995 F Supp2d 251, 253 [SD NY 2014], *affd BPP*

Wealth, Inc. v Weiser Capital Mgt., LLC, 623 Fed Appx 7 [2d Cir 2015]; *Simonds v Simonds*, 45 NY2d 233, 243 [1978]; *Collins Tuttle & Co. v Leucadia, Inc.*, 153 AD2d 526 [1st Dept 1989]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2124N Boyd Allen, Index 21579/13E
Plaintiff-Respondent,

-against-

Pedro Hiraldo, et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Marjorie E. Bornes of counsel), for appellants.

Hausman & Pendzick, Harrison (Alan R. Gray, Jr. of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered June 12, 2015, which, to the extent appealed from as limited by the briefs, denied defendants' motion to preclude plaintiff from offering evidence at trial, or alternatively, to vacate the note of issue and certificate of readiness and compel plaintiff's deposition and physical examination, unanimously affirmed, without costs.

Supreme Court properly denied as untimely the motion to vacate the note of issue and certificate of readiness. Defendants failed to make the motion within 20 days after service of the note and certificate, nor did they show good cause for the delay (*see* 22 NYCRR 202.21[e]; *Kelley v Zavalidroga*, 55 AD3d 1391 [4th Dept 2008], *lv dismissed* 11 NY3d 911 [2009]). They also

failed to show, by way of affidavit, that plaintiff's deposition and physical examination were required to "prevent substantial prejudice" because "unusual or unanticipated circumstances" had developed subsequent to the filing of the note and certificate (22 NYCRR 202.21[d]; *Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]; *Price v Bloomingdale's*, 166 AD2d 151, 151-152 [1st Dept 1990]).

We reject defendants' argument that the motion court should have considered their motion to be a motion in limine. Any outstanding discovery is due to defendants' own inaction, and they cannot avoid the time requirements of 22 NYCRR 202.21(e) by characterizing their motion as a motion in limine (*see Sadek v Wesley*, 117 AD3d 193, 203 [1st Dept 2014]; *see also Brewi-Bijoux v City of New York*, 73 AD3d 1112, 1113 [2d Dept 2010]).

We have considered defendants' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1653 The People of the State of New York, Ind. 3328/12
Respondent,

-against-

Thomas Hoey,
Defendant-Appellant.

_____

Law Offices of James Kousouros New York (James Kousouros of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered February 27, 2015, reversed, on the law, and the matter remanded for a new trial and a de novo hearing addressing the prosecution's *Molineux/Ventimiglia* application.

Opinion by Feinman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, J.P.
Rolando, T. Acosta
Paul G. Feinman
Barbara R. Kapnick
Marcy L. Kahn, JJ.

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Ind. 3328/12

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The People of the State of New York,
Respondent,

-against-

Thomas Hoey,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered February 27, 2015, convicting him of tampering with physical evidence and assault in the third degree, and imposing sentence.

Law Offices of James Kousouros New York (James Kousouros of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes and Hilary Hassler of counsel), for respondent.

FEINMAN, J.

A jury convicted defendant of assault in the third degree (Penal Law § 120.00[1]) as against his girlfriend and tampering with physical evidence (Penal Law § 215.40). The dispositive issue on this appeal is whether defendant's absence from colloquies before the trial judge relating to the admissibility of evidence of uncharged crimes and bad acts allegedly committed by defendant against his girlfriend, and others, deprived him of his right to be present at all material stages of the trial. Defendant was present when these issues were initially discussed at the hearing on his suppression motion, approximately a year before the matter went to trial before another justice. It was the trial court that ultimately ruled on the prosecution's *Molineux/Ventimiglia* application to admit evidence of uncharged crimes and bad acts on its case-in-chief (*People v Molineux*, 168 NY 264 [1901]; *People v Ventimiglia*, 52 NY2d 350 [1981]). Based on our review of the record, we find that defendant was not present before the trial court for all of the core proceedings related to the People's application. Furthermore, because the record is silent as to the trial court's rationale as to some of its rulings, we are unable to meaningfully review whether these were proper exercises of discretion. Thus, we reverse defendant's conviction and remand the matter for a new trial and

a de novo *Molineux/Ventimiglia* hearing.

Factual and Procedural Background

During the evening of March 30, 2012, a neighbor in defendant's apartment building heard a stairwell door slam, the sound of running and scuffling in the hall, and a female voice saying, "[O]h, no, no, please don't." The sounds continued, and the door slammed twice more. The neighbor stepped into the hallway and heard whimpering on the other side of the stairwell fire door. She pushed open the door to find defendant standing on the other side, holding the wrist of a woman who appeared to be attempting to ascend the stairs toward the next floor. Defendant told her that everything was "okay" and that they had fallen down the stairs. However, the woman's face was "covered in blood," and there was "pooled blood" on the floor and swipes of blood on the stairwell walls. The neighbor said she was going to call the police. When she returned, she saw a trail of blood from the stairwell to defendant's apartment door. She heard sobbing from behind the door and a male voice saying, "[H]urry up, she's calling 911." Defendant opened his apartment door and wiped up some of the blood spattered outside the doorway.

Over the course of the next 20 to 45 minutes, six officers and a police sergeant arrived on the scene, as well as two EMS responders. Defendant was asked by the first two officers to

come into the hallway, and remained outside his apartment with at least one officer until his arrest. His girlfriend stayed in the apartment. Initially she did not respond to questions other than to say that she did not want defendant arrested. Eventually she stated that nothing had happened and that she had fallen. The officers described her as having wet or damp hair, and some saw that her face was also wet or damp and that there were the beginnings of swelling or bruising on her face. Some were able to look briefly at the top of her head before she demanded that they stop. Some saw blood matted in her hair. She repeatedly requested that the officers and the sergeant leave. She declined assistance from the EMS responders and refused to be examined.

Defendant was asked several times what had happened. He said that his "wife" had gone out for a couple of drinks, and that he had gone out, and that they had gotten into a fight. He answered variously that the blood had come from picking or scratching his nose, or that he did not know its origins. Once defendant asked for an attorney, questioning ceased. Shortly thereafter, defendant was arrested.

In July 2013, the parties, including defendant, appeared for a hearing on defendant's motion to suppress his statements to the police (*People v Huntley*, 15 NY2d 72 [1965]). At the hearing, the People also presented their lengthy *Molineux/Ventimiglia*

application. The court entertained extensive oral argument on both motions, and defendant's counsel was also permitted to submit a written response. On August 1, 2013, the hearing court issued its decision on the suppression motion, ruling, in relevant part, that defendant's statements to the first two police officers on the scene were voluntary and that he was not in custody at the time and had not yet asked for an attorney. The court did not issue a decision addressing the *Molineux/Ventimiglia* issues.

Defendant's trial commenced in May 2014 before a different judge, after two days of on-the-record pretrial conference. On more than one occasion, the trial court referred to an earlier "informal" off-the-record pretrial conference wherein "potential issues," and "many" things were discussed, including "rulings." The trial court assured the parties that it would "clearly give," as "required," "sua sponte," instructions "on some of the *Molineux* issues."

Before the jury entered on the second day of trial, the People requested permission to question the victim's cousin about a previous phone call wherein the victim indicated that although she had been injured, she did not want to get defendant in trouble. In making the application, the prosecutor assured the court that the People were mindful that some testimony had been

"sanitized out" and that they were not challenging that ruling. In response, the court noted for the record that there had been "an extensive conversation" that "led to an unofficial ruling" on *Molineux*, culminating in a written summary prepared by the People, and that later it would "dictate very briefly an outline of our discussions . . . and the ruling[ ]."

The next morning, the trial court directed that the *Molineux* summary, which "[e]veryone" agreed correctly reflected the court's rulings, be made Court Exhibit Number II.

The record reflects that the trial court gave limiting instructions to the jury during the testimony of the victim's cousin and father and in the final jury charge. The record also shows that when the prosecution again sought to expand the scope of the ruling, the trial court denied the request in its entirety, noting that the additional evidence would likely be more prejudicial than probative.

Discussion

Criminal defendants have a fundamental right under the state and federal constitutions to be present at all material stages of trial, that is to say, whenever witnesses are called or evidence is presented against the defendant, as well as when the defendant's presence "'might bear a substantial relationship to a defendant's opportunity better to defend himself at trial' and

the stage of the criminal proceeding is 'critical' to its outcome" (*People v Sprowal*, 84 NY2d 113, 116-117 [1994], quoting *Kentucky v Stincer*, 482 US 730, 739, 745-746 [1987]; *see Snyder v Massachusetts*, 291 US 97, 105-107 [1934]).

In New York, Criminal Procedure Law § 260.20 also provides that a defendant "must" be present during the trial of an indictment. This protection accrues in ancillary proceedings where factual matters are at issue about which a defendant might have "'peculiar knowledge that would be useful in advancing the defendant's or countering the People's position'" (*People v Spotford*, 85 NY2d 593, 596 [1995], quoting *People v Dokes*, 79 NY2d 656, 660 [1992]). "[T]he right does not rest exclusively on defendant's potential contribution to the proceedings" (*People v Morales*, 80 NY2d 450, 456 [1992]). Rather, it is based on "the effect that defendant's absence might have on the opportunity to defend" (*id.*).

Absence from a stage of trial at which a defendant's presence is required violates the Confrontation and Due Process Clauses as well as New York's statutory law; it is a fundamental error and, absent an exception, requires reversal of the verdict (*see People v Spotford*, 85 NY2d at 597; *People v Dokes*, 79 NY2d at 662; *People v Cain*, 76 NY2d 119, 124 [1990]; *People v Sanchez*, 270 AD2d 15, 17 [1st Dept 2000], *appeal withdrawn* 95 NY2d 803

[2000]). On the other hand, there is no error where a defendant has not attended an ancillary proceeding involving only questions of law and procedure, since his or her presence would be "useless" (*People v Rodriguez*, 85 NY2d 586, 591 [1995] [internal quotation marks omitted]; *see People v Sloan*, 79 NY2d 386, 392 [1992]).

The People do not dispute that defendant was absent from the "informal" pretrial conference with the trial court. They disagree that defendant was required to be present. The People argue that defendant was present when the attorneys initially made their *Molineux/Ventimiglia* arguments a year earlier before the suppression court, and had an opportunity to participate at that time as well as to offer input when his attorney drafted the opposition memorandum submitted to the suppression court. In effect, they argue that the attorneys' informal conference with the trial court merely repeated the earlier hearing at which defendant was in attendance. They also argue that the trial court's *Molineux/Ventimiglia* rulings were made a part of the record during the early stages of the trial, and that defendant had an opportunity to review and challenge them first when the trial court referenced the existence of the written "summary" and again when that document was made a court exhibit. However, the record does not reflect that defendant was given an opportunity

at any point to review the summary. Additionally, although the trial court made its written rulings a court exhibit, the record is devoid of any recitation of the reasoning behind the rulings, i.e., that the evidence was probative of defendant's motive, intent or identity, the absence of mistake or accident, or a common scheme or plan (*see People v Allweiss*, 48 NY2d 40, 47 [1979]). Notably absent is any indication that the court found the evidence relevant and admissible because its probative value as to one of the recognized *Molineux/Ventimiglia* exceptions outweighed its prejudicial effect (*see id.*).

The People suggest that this matter is procedurally similar to *People v Liggins* (19 AD3d 324 [1st Dept 2005], *lv denied* 5 NY3d 853 [2005], and that we should follow the reasoning of *Liggins* to find that there was no error in defendant's absence from the informal conference with the trial court. In *Liggins,* the *Sandoval*[1] and *Molineux/Ventimiglia* hearings were conducted in several stages, including the proffering of a written submission by the defense attorney. The defendant was present only for the initial segment at which the arguments on admissibility were presented. We held that the defendant's presence at the initial segment was critical, because he could offer meaningful input,

[1]*People v Sandoval* (34 NY2d 371 [1974]).

and that his presence was not required at the subsequent stages involving discussions of law and procedure (*see People v Rivera*, 201 AD2d 377 [1st Dept 1994], *lv denied* 83 NY2d 875 [1994]).

What transpired in the case at bar is not the same as what happened in *Liggins*. Here, the arguments on admissibility were conducted before two different judges, a year apart, and defendant was not present the second time, when the attorneys conferred with the judge who considered their arguments and made rulings. Furthermore, some of the discussions were not even recorded, occurring as they did in the trial judge's chambers or robing room without a court reporter. These are significant differences. It is not clear, for instance, that the papers originally submitted to the hearing court were also submitted to the trial court, or whether the trial court considered them. Nor is it clear whether the trial court read the hearing transcript or conducted its own de novo hearing. Even if the trial court considered the same papers and read the hearing transcript, the record is silent as to what particular facts were emphasized at the hearing before the trial court, what the court's concerns were, and its reasons for making its rulings. The informal pretrial hearing was not, therefore, a sort of reargument of purely legal issues at which defendant could have nothing to contribute (*cf. People v Dokes*, 79 NY2d at 658-659 [the mere

fact that the defendant was present for a *Sandoval* hearing held during an earlier proceeding to try him on the same charges did not negate the necessity for his attendance at the second hearing in a new trial; the second hearing was de novo, and the benefits from the first hearing did not carry over to the second]). Thus, it cannot be said with any degree of certainty that defendant's presence at the pretrial *Molineux/Ventimiglia* hearing before the trial court would have been "useless, or the benefit but a shadow" (*People v Sloan*, 79 NY2d at 392 [internal quotation marks omitted]).

Additionally, although the People suggest that defendant had an opportunity to review the rulings shortly after the trial court referred to them and then had them marked as a court exhibit, the record does not indicate that defendant was given an opportunity to review and discuss the "*Molineux* summary" with his attorney before it was marked as a court exhibit.

For all these reasons, we conclude that defendant's presence was required at the hearing before the trial court (*compare People v Guerrero*, 27 AD3d 386 [1st Dept 2006], *lv denied* 7 NY3d 756 [2006] [no error where the court put its decision on the record during the calendar call, not attended by the defendant, because the court had already decided the motion]; *People v Martinez*, 261 AD2d 143 [1st Dept 1999], *lv denied* 93 NY2d 1022

[1999] [although the defendant was not present at the preliminary *Sandoval* discussion, the court held an "essentially . . . de novo hearing in his presence," and the defendant had the opportunity to object on the record prior to the final ruling]). Defendant's presence during oral argument before the suppression court a year earlier cannot substitute for his presence at the *Molineux/Ventimiglia* hearing before the trial court, which heard and then ruled on the application. Accordingly, we reverse defendant's conviction and order a new trial (*see People v Dokes*, 79 NY2d 656).

Upon remand, the trial court should conduct a de novo *Molineux/Ventimiglia* hearing. In doing so, it should place on the record its findings as to which uncharged crimes and bad acts are admissible because they are relevant to a pertinent issue in the case other than defendant's criminal propensity toward violence against the victim (*see People v Till*, 87 NY2d 835, 836 [1995]). The relevant *Molineux/Ventimiglia* exception, or exceptions, if more than one is applicable, should be noted on the record, as well as when evidence is needed to complete the narrative of the events charged in the indictment or to provide necessary background (*see People v Morris*, 21 NY3d 588, 594 [2013]). The court should expressly recite its discretionary balancing of all the factors (*see People v Bradley*, 83 AD3d 1444

[4th Dept 2011], *revd on other grounds* 20 NY3d 128 [2012]).

The record should be made clear as to which of the *Molineux/Ventimiglia* exceptions the court is invoking for each of the various uncharged crimes and bad acts it may decide to admit and whether the necessity and probative value of the evidence is found to outweigh the prejudice to defendant (*see People v Cook*, 93 NY2d 840 [1999]; *People v Till*, 87 NY2d at 837). It goes without saying that the record should also show that in each instance, proper limiting instructions are given to the jury (*People v Morris*, 21 NY3d 588).

In light of the foregoing, we need not reach defendant's ineffective assistance of counsel claim. However, we address some of the other issues raised by defendant.

Upon retrial certain comments in the prosecutor's summation should not be repeated because they went beyond merely being responsive to defense counsel's summation. More specifically, while the prosecutor is free to respond to defense counsel's comments about the failure of the victim to testify, the response must be evidence-based and may not improperly convey the prosecutor's personal opinion of defendant's guilt.

Viewing the evidence in the light most favorable to the prosecution, we find that it was legally sufficient (*see People v Schulz*, 4 NY3d 521, 529 [2005]). Nor was the verdict against the

weight of the evidence, notwithstanding the absence of testimony from the victim (*see People v Danielson*, 9 NY3d 342 [2007]). In total, the evidence, which included both direct and circumstantial evidence of defendant's guilt of both crimes, was not seriously impeached.

Finally, we find that the suppression court properly ruled that defendant's statements made to Police Officer Williams were not the product of custodial interrogation and were therefore admissible (*see People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]; *People v Dillhunt*, 41 AD3d 216 [1st Dept 2007], *lv denied* 10 NY3d 764 [2008]).

Accordingly, the judgment of the Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered February 27, 2015, convicting defendant of tampering with physical evidence and assault in the third degree, and sentencing him to an aggregate term of 1⅓ to 4 years, should be reversed, on the law, and the matter remanded for a new trial and a de novo

hearing addressing the prosecution's *Molineux/Ventimiglia* application.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2016

CLERK